UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, vs. SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington, Defendants.	No. 3:09-CV-05456-BHS **PLAINTIFFS' MOTION TO AMEND COMPLAINT AND JOIN ADDITIONAL PARTIES** NOTE ON MOTION CALENDAR: Wednesday, October 7, 2009 The Honorable Benjamin H. Settle

BOPP, COLESON & BOSTROM
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TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

YOU ARE HEREBY GIVEN NOTICE THAT on October 7, 2009, before the Honorable Judge Benjamin H. Settle, at the United States District Court for the Western District of Washington, Tacoma Division, located at 1717 Pacific Avenue, Tacoma, Washington, 98402, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington, will and hereby do move for leave to file their Verified First Amended Complaint, attached hereto as Exhibit 1, and to join additional parties.

This motion for leave to file an amended complaint and join additional parties is made pursuant to Fed. R. Civ. P. 15(a)(2), Fed. R. Civ. P. 18(a), Fed. R. Civ. P. 20(a)(2)(B), and on the grounds specified in this notice of motion and motion, Plaintiffs' Memorandum in Support Thereof, incorporated into this notice of motion and motion, the declarations filed in support Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

I. Statement of Facts

Plaintiffs filed their Verified Complaint in this matter on July 28, 2009, alleging that the Washington Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.* ("RCW"), violates the First Amendment to the United States Constitution. (Doc. 2.) On July 29, 2009, the Court granted Plaintiffs' request for a temporary restraining order. (Doc. 9.) On September 3, 2009, the Court granted Washington Coalition for Open Government's ("WCOG") and Washington Families Standing Together's ("WAFST") motions to intervene. (Doc. 62.) On September 10, 2009, the Court granted Plaintiffs' motion for a preliminary injunction with respect to Count I of Plaintiffs' verified complaint. (Doc. 63.) The State Defendants, WCOG, and WAFST subsequently appealed this Court's order granting Plaintiffs' motion for a preliminary injunction. (Docs. 65, 67, & 82.) The Ninth Circuit consolidated the appeals of the State and WCOG, and oral arguments are scheduled for October 14, 2009.

On Friday, September 25, 2009, Defendants Reed and Galarza filed their answer. (Doc. 79.) Pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiffs are required to obtain the consent of opposing

counsel, or leave of court. *But see*, *Goldlawr, Inc. v. Schubert*, 169 F. Supp. 677, 689 (E.D. Penn. 1958) (stating that a party may amend a pleading as of right under Fed. R. Civ. P. 15(a)(1)against any party that has not filed a responsive pleading, even if another party has filed such a pleading). *See also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1481 (2d ed. 2009) (same) ("Wright & Miller").

On Monday, September 28, 2009, Scott F. Bieniek, counsel for Plaintiffs, sought Defendants consent pursuant to Fed. R. Civ. P. 15(a)(2). Defendants Reed and Galarza, through their counsel James K. Pharris, indicated that they would be unable to consent to such an amendment. WCOG, through its counsel, Duane M. Swinton, also indicated that it would be unable to consent to such an amendment. WAFST, through its counsel, Ryan McBrayer, also indicated it would be unable to consent to the amended complaint.

Plaintiffs now respectfully request that this Court grant Plaintiffs motion to amend their verified complaint to incorporate three challenges to the Washington Public Disclosure law, RCW § 42.17.010 *et seq*., and to add as Defendants:

(1) Rob McKenna, in his official capacity as Attorney General of Washington;

(2) Jim Clements, David Seabrook, Jane Noland, and Ken Schelleberg, in their official capacity as members of the Public Disclosure Commission (collectively "the PDC"), and;

(3) Carolyn Weikel, in her official capacity as Auditor of Snohomish County, Washington (collectively, "Proposed Defendants").

II. Argument

A. Plaintiffs should be granted leave to amend their verified complaint to add additional independent counts.

1. Plaintiffs should be granted leave to amend their verified complaint pursuant to Fed. R. Civ. P. 15(a)(2).

Federal Rule of Civil Procedure 15(a)(2) provides that"

> [A] party may amend its pleading only with the opposing party's written consent or the court's leave. The Court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a)(2). The Supreme Court has emphatically stated that the rule's mandate that

leave should be freely given is a mandate that must be heeded. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Court added:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id. Generally, if the opposing party will not be prejudiced, leave should be granted. 6 Wright & Miller, Federal Practice and Procedure § 1487.

Here, Defendants would not be unduly prejudiced by the proposed amendments at this early stage of the litigation. Plaintiffs filed suit on July 28, 2009. Only the State Defendants have filed an answer and very little, if any, discovery has occurred.

Furthermore, the underlying facts with respect to Count V of the proposed Verified First Amended Complaint are virtually—if not completely—identical to the facts necessary to prove Count II of Plaintiffs original complaint. Both counts require Plaintiffs to establish that compliance with the State statutes will result in a reasonable probability of threats, harassment, and reprisals. Plaintiffs will present the same evidence of threats, harassment, and reprisals for each count. Forcing Plaintiffs to bring the claims in separate proceedings would be a waste of judicial resources and would actually burden *Defendants* as they would have to conduct discovery in both cases with respect to the same underlying facts.

Plaintiffs also suspect that the State Defendants, and perhaps WCOG, will attempt to introduce similar evidence with respect to all other claims in an effort to demonstrate that the statutes are narrowly tailored to serve a compelling government interest. In light of the substantial similarity between these claims, the lack of prejudice to the non-moving parties, and the judicial resources saved by permitting Plaintiffs to bring all of their claims in one proceeding, Plaintiffs' motion to amend should be granted.

2. Plaintiffs should be allowed to add additional independent claims under Fed. R. Civ. P. 18(a).

Federal Rule of Civil Procedure 18(a) states:

> A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

Fed. R. Civ. P. 18(a). The rule is liberally interpreted. As the Supreme Court has stated, "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966); *see also* 6A Wright & Miller, Federal Practice and Procedure § 1582 ("Except for the limitations imposed by the requirements of federal subject-matter jurisdiction, there is no restriction on the claims that may be joined in actions brought in the federal courts"); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1991) ("[T]he Federal Rules of Civil Procedure place no limits on the joinder of unrelated claims and parties in a single pleading").

Under Fed. R. Civ. P. 18, Plaintiffs would be able to assert the claims in their Verified First Amended Complaint against Defendants, even if the claims were unrelated to those in their Verified Complaint. However, as set forth above, the underlying facts with respect to Count V of the proposed Verified First Amended Complaint are virtually—if not completely—identical to the facts necessary to prove Count II of Plaintiffs original complaint, as both counts require Plaintiffs to establish that compliance with the State statutes will result in a reasonable probability of threats, harassment, and reprisals. This relationship between the original counts and the proposed new counts thus goes beyond that required by Fed. R. Civ. P. 18. That Fed. R. Civ. P. 18 allows for the joinder of Plaintiffs' new claims makes sense; if the claims proposed by Plaintiffs in their Verified First Amended Complaint were forced to be brought in a separate suit, the evidence Plaintiffs would present in both lawsuits related to the threats, harassment, and reprisals would be identical, or virtually identical. Forcing Plaintiffs to bring a separate suit would not only be contrary to Fed. R. Civ. P. 18, it would be a waste of judicial resources, and, as set forth above, would actually burden *Defendants*, because Defendants would have to conduct discovery in both cases with respect to the same underlying facts.

B. Plaintiffs should be granted leave to add additional parties, because joinder is required under Fed. R. Civ. P. 19(a)(1).

If Plaintiffs request for leave to amend is granted, Plaintiffs should be allowed to add Proposed Defendants. The joinder of Proposed Defendants is required under Fed. R. Civ. P. 19(a)(1) because complete relief is not possible among existing parties. *See* (Ex. 1, Verified First Amended Complaint ¶¶ 16, 18-20.) (setting forth the enforcement and administrative roles played by the Proposed Defendants)

Mandatory joinder in the federal courts is governed by Federal Rule of Civil Procedure 19(a)(1) ("Rule 19"), which states:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Under Fed. R. Civ. P. 19(a)(1), joinder is necessary if either subsection (A) or (B) is satisfied. The Ninth Circuit has stated that: "This court undertakes a two-pronged analysis to determine whether a non-party is necessary under Rule 19(a). If a non-party satisfies either of the two prongs, the non-party is necessary. First, we determine whether 'complete relief' is possible among those already parties to the suit. . . .Second, we decide whether the non-party has a legally protected interest in the suit." *Yellowstone County v. Pease*, 96 F.3d 1169, (9th Cir. 1996) (emphasis, footnote and citations omitted); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The joinder inquiry "should focus on the practical effects of joinder and nonjoinder." *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981); *see also Provident Tradesmens Bank &*

Trust Co. v. Patterson, 390 U.S. 102, 116 n.12 (1968) (the decision as to whether a party is necessary "must be made on the basis of practical considerations").

The first inquiry under Fed. R. Civ. P. 19 requires a court to "decide if *complete relief* is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (emphasis in original). Further, "[t]his portion of the rule is concerned only with 'relief as between the persons already parties, not as between a party and the absent person whose joinder is sought.'" *Eldredge*, 662 F.2d at 537 (quoting 3A Moore's Federal Practice P 12.07-1(1), at 19-128 (2d ed. 1980)). Finally, "[t]he relevant question for Rule 19(a) must be whether success in the litigation can afford the plaintiffs the relief for which they have prayed." *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1501 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part). The second inquiry "required by rule 19(a) concerns prejudice, either to the absent persons or to those already parties." *Eldredge*, 662 F.2d at 538. This second inquiry is primarily concerned with whether a potential party has a "legally protected interest" in the litigation.

Here, the Proposed Defendants meet the first prong of the required joinder test because the non-parties are necessary to ensure "complete relief" for Plaintiffs. Proposed Defendant Rob McKenna, the Attorney General for the State of Washington, is charged with supplying such assistance as the Public Disclosure Commission may require, as well as being granted the authority to investigate and bring civil actions on behalf of Washington for any violation of the Public Disclosure Law. RCW §§ 42.17.380; 42.17.400. The Proposed Defendant members of the Public Disclosure Commission are granted the authority to enforce the Public Disclosure Law. RCW § 42.17.360(7). Proposed Defendant Carolyn Weikel, the Auditor of Snohomish County, is charged with receiving copies of reports filed by Plaintiff Protect Marriage Washington. RCW §§ 42.17.040(1); 42.17.080(1). Each of these parties is therefore necessary to

ensure that Plaintiffs, if successful, are able to obtain complete relief against both the application and enforcement of the challenged portions of Washington's Public Disclosure Law.[1]

Because the Proposed Defendants are necessary parties under the first part of the Fed. R. Civ. P. 19 required joinder test, this Court need not reach the second prong of the test. However, even if this Court applies the second prong of the required joinder test, the Proposed Defendants must be joined to the case. The Proposed Defendants have legally protected interests in suits brought to challenge the Constitutionality of the Public Disclosure Law, because they are the individuals and groups responsible for the enforcement and application of the Public Disclosure Law. If Plaintiffs are not able to join the Proposed Defendants, they will be prejudiced in their ability to obtain their requested relief if this Court ultimately finds in their favor, because the Proposed Defendants are those who are able to enforce and apply Plaintiffs' requested relief. Moreover, Proposed Defendants will be prejudiced if they are not joined to this suit, because any relief obtained by Plaintiffs may subject the Proposed Defendants to orders of this Court against which they did not have the opportunity to defend, despite their legally protected interests in the outcome of this suit. Thus, under both prongs of the required joinder test, the Proposed Defendants are necessary parties.

[1] Under the Public Disclosure Law, the Secretary of State is designated as a place where the public may file papers or correspond with the Public Disclosure Commission and receive any form or instruction from the Commission. RCW § 42.17.380. Thus, Defendant Reed is a proper Defendant with respect to Counts III, IV, & 5 in Plaintiffs' Proposed Verified First Amended Complaint.

III. Conclusion

For the reasons set forth above, this Court should grant Plaintiffs' Motion to Amend Complaint and Join Additional Parties.

Dated this 28th day of September, 2009.

Respectfully submitted,

/s/ Scott F. Bieniek

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**Pro Hac Vice Application Granted*

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CERTIFICATE OF SERVICE

I, Scott F. Bieniek, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On September 28, 2009, I electronically filed the foregoing document described as Plaintiffs' Motion to Amend Complaint and Join Additional Parties with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 28th day of September, 2009.

/s/ Scott F. Bieniek
Scott F. Bieniek
Counsel for All Plaintiffs